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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1965**

**No. 1001**

EUGENE KENNER,

*Petitioner,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.**

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Eugene Kenner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on December 15, 1965, affirming a judgment of conviction in the United States District Court for the Southern District of New York, entered on April 15, 1965, after trial before Honorable THOMAS F. MURPHY, United States District Judge, and a jury.

## Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit has not yet been officially reported. It is reproduced in Appendix A to this Petition.

## Jurisdiction

The judgment sought to be reviewed was made and entered on December 15, 1965. By an order of Mr. Justice JOHN M. HARLAN of this Court, dated January 5, 1966, the time of the petitioner for filing a petition for writ of certiorari was extended to and including February 12, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

## Questions Presented

1. Was the additional charge to the jury (given by the trial judge after the jury had announced that it was "hopelessly deadlocked") impermissibly coercive and a denial of the constitutional rights of the petitioner?

2. Was the supplemental charge given by the trial judge to the jury (after the jury had sent him a note reading: "Require, if possible, a clearer definition of charge in each group and three words, bribery, gratuity and aiding and abetting"), which supplemental charge was substantially a *verbatim* repetition of the original charge on the same subject without any further clarification, insufficient as a matter of law, a violation of the petitioner's right to a properly instructed jury and a disregard of the trial judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria so that the jury might meet its responsibility for drawing appropriate conclusions from the testimony?

3. Where, as in the case at bar, it is undisputed that secret electronic tape recordings were made of conversations between a leading Government witness, acting as an undercover agent, and another important Government wit-

ness, in a hotel room occupied by the undercover agent, and where, as in the case at bar, only a portion of such tape recordings were offered for examination by counsel for the defendant, who demanded all the recordings, and such counsel was refused a *voir dire* examination to determine whether other tape recordings had a bearing on the case and on the testimony of the important witness involved, was it reversible error to refuse the demands of defendant's counsel and to refuse to follow the procedure provided in 18 U. S. C. §3500?

4. Was it an abuse of discretion and a violation of the constitutional rights of the defendant to refuse the demand and procedure referred to in question 3, above, merely because that demand was made after both sides had rested, although the demand was made prior to summation by either side and prior to the charge of the court?

5. Did the trial court err in refusing dismissal of counts 23 and 24 of the indictment, alleging the commission of crimes more than three years prior to the filing of the indictment and where the evidence adduced respecting those counts established, if anything, that the acts complained of took place more than three years prior to the finding and filing of the indictment?

6. Did the trial court err in refusing to dismiss counts 23 through 27, inclusive, of the indictment as to the defendant; since, in the circumstances of this case, the defendant could not aid, abet, induce or procure the commission of the offenses set forth in those counts, because those persons alleged to have committed the offenses did not, *as a matter of law,* commit them?

7. Did the trial court err in charging, as to counts 15, 16, 17, 20, 21 and 22 of the indictment that there was "no need for the government to prove that the payment of

money was with a corrupt intent to influence the employee, but rather only to prove that the defendant paid the money wilfully and knowingly, that is, intentionally, as distinguished from inadvertently or negligently"?

8. Is 18 U. S. C. §201(f), both in its text and in its application in the instant case, unconstitutionally vague, in violation of the Fifth Amendment to the United States Constitution?

## Constitutional Provisions, Statutes and Rules Involved

The following are the constitutional provisions, statutes and rules involved, the texts of which are set forth in Appendix B of this Petition:

Amendments 5 and 8 of the United States Constitution; Title 18, United States Code, sections 2, 201 and 3500; Title 26, United States Code, sections 6531 and 7214; Federal Rules of Criminal Procedure, numbers 29(a), 31(a) and 52(b).

## Statement of the Case*

For the convenience of this Court and in the spirit of its Rule 23(e) we subdivide our statement of the case as follows: first, we give a general outline of the proceedings applicable to all of the questions presented as hereinabove enumerated; then, we proceed to a statement of the

* Parenthetical numerical references, hereinafter, unless otherwise indicated, are keyed as follows: references to pages in the Appendix to Appellant's Brief in the Court of Appeals are prefixed by the letter "A"; references to pages in the Appendix to Government's Brief in the Court of Appeals are prefixed by the letter "G"; references to pages in the transcript of the trial in the District Court [the certified "Record on Appeal"] are prefixed by the letter "R"; references to the Appendices to this application are prefixed by the legend "App."

additional facts material to the consideration of each of such questions, separately subdivided. In our argument amplifying the reasons relied on for the allowance of the writ, pursuant to Rule 23(h) of this Court, we follow the same method of subdivision.

**General Outline.**

Petitioner (hereinafter *sometimes* referred to as defendant) was tried in the United States District Court for the Southern District of New York upon a twenty-nine count indictment (A 3a-10a).* On consent of the government, which indicated that it did not intend to submit any evidence with respect thereto, the court dismissed as to Petitioner seven counts [numbered 1, 10, 11, 18, 19, 28 and 29] at the opening of the trial (R 13-14).

The disposition of the other counts was as follows:

(a) Petitioner was acquitted of counts 2 through 6, inclusive (R 383), which charged that, in violation of 18 U. S. C. § 201, he gave small sums of money to certain employees of the Internal Revenue Service with intent to influence their decisions and action in office audit examinations of the income tax returns of taxpayers, the dates of the alleged offenses, the names of the taxpayers and agents, and the sums received with respect to each return being specified in the indictment (A 6a). The defendant was found guilty of counts 23 through 27, inclusive (R 384-385), which charged the defendant with aiding and abetting the *same* Internal Revenue agents in receiving the *same* amounts of money with respect to the income tax returns of the *same* taxpayers, on the *same* dates set forth in counts 2-6 (A 9a), in violation of 18 U. S. C.

* The basis for Federal jurisdiction in the United States District Court for the Southern District of New York was 18 U. S. C. §3231 and Fed. Rules Cr. Proc. rule 18.

§2 [aiding and abetting] as applied to 26 U. S. C. §7214(a)(2).(A 9a).

(b) The defendant was acquitted of counts 12 and 13 (R 383), which charged that he gave small sums of money to a certain employee of the Internal Revenue Service with intent to influence his decision and action in office audit examinations of the income tax returns of taxpayers, the dates of the alleged offenses, the names of the taxpayers and the description of the agent [as an "Internal Revenue employee"]* and the sums he received with respect to each return being specified in the indictment (A 7a). The defendant was found guilty of counts 20 and 21 (R 384), which charged the defendant with giving the *same* Internal Revenue agent, the *same* amounts of money with respect to the income tax returns of the *same* taxpayers, on the *same* dates set forth in counts 12 and 13 (A 8a), in violation of 18 U. S. C. §201(f). (A 8a).

(c) The defendant was acquitted of all of the other counts of the indictment.

The testimony against defendant was given by several Internal Revenue Service employees, who had pleaded guilty on the date defendant's trial began to receiving money from him under various counts of the indictment (A 1a, 2a) and by one Internal Revenue Service employee, who was acting as an undercover agent for the Government (R 238).** The evidence was to the effect that, at

---

* The Internal Revenue employee, who is described as such without a name in the indictment, was William Coady (A 36a and 44a).

** The defendant did not take the stand. At his request, the jury was charged that he had "a perfect right not to testify" and that, as a matter of law, the jury was "to draw no inference whatsoever from the defendant's failure to testify." (R 366). Another agent, who did not plead guilty, also testified as did a former client of defendant (A 14a; G 1a).

various times, defendant requested the testifying employee of the Internal Revenue Service to assign the tax return of a taxpayer to himself for audit and suggested an amount that should be disallowed as an expense in the audit of the return, that the testifying employee complied with defendant's request and that, thereafter, defendant gave the employee a small sum of money (A 12a-13a, 16a-19a, 21a-24a, 25a-27a, 28a-30a; G 11a-12a). There was not a scintilla of evidence that the amount which the defendant suggested should be disallowed was improper!

The Chief of Employee Relations and Services of the New York Region of the Internal Revenue Service, called as a witness by defendant, testified that, during the years in which the defendant was alleged to have committed the crimes charged, it was "acceptable behavior" for an Internal Revenue Service employee to be taken to lunch by a taxpayer, or the taxpayer's lawyer or accountant, and for the taxpayer or his representative to pay the luncheon check, and that this was true on all levels of the Internal Revenue Service from the Commissioner "on down to the lowest agent" (A 30a-31a).

The defendant, prior to sentence, moved for a new trial and to dismiss the indictment and to set aside the verdict as contrary to the law and the evidence (A 50a-63a), which motion was opposed by the Government (A 63a-70a) and denied by the trial court without opinion (A 70a). The defendant was sentenced to imprisonment for one year on each of the counts of which he was convicted, the sentences to run concurrently (A 71a-72a). Thereafter, defendant moved "to correct an illegal sentence" upon the ground that prosecution of the charges contained in counts 23 and 24 of the indictment, on which he was convicted, was barred by the running of the statute of limitations. The motion was denied in the District Court on the ground that, since an appeal had been taken, that

court could not rule on the motion. The Court of Appeals, in effect, denied the motion upon the ground that the defense of the statute of limitations had not been raised before or during the trial (App. 10).

**The Coercive Charge.** (Question 1, *supra*).

After having deliberated for almost four hours, the jury sent a note to the court which read: "Jury hopelessly deadlocked. No change in sight." (A 47a). The Government then requested "an Allen charge" to which defendant objected (A 47a). The trial judge noted and overruled the objection, granted an exception to defendant and proceeded to charge the jury in the following language (A 47a-48a):

> "The Court: Ladies and gentlemen, I have a note from you which reads, 'Jury hopelessly deadlocked. No change in sight.'
>
> "You know, if you add up the time that you have been deliberating it comes to about forty-five minutes from quarter twelve until one o'clock, and then say roughly from two until now, and if my mathematics are correct, it comes to about three hours and forty-five minutes, which is not one of the world's records for jury deliberation.
>
> "But these things happen and I am going to tell you what the United States Supreme Court said, about one hundred years ago, in a somewhat similar situation. That Court said:
>
> > 'While undoubtedly the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to seek your unanimity by a comparison of views and by arguments amongst the jurors themselves. It certainly cannot be the law

> that each juror should not listen with deference to arguments and with a distrust of his own view, his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment or that he should close his ears to the arguments of men who are equal and equally intelligent as himself.'
>
> "I am going to suggest that you think about that and go back and try again. You know, what we all try to achieve is unanimity in these cases. I hope that you can do it. I don't mean by reading this charge to coerce some juror who feels that he or she is of this opinion or that but certainly the advice of the Supreme Court should be heeded.
>
> "It may be that you can agree on some of the counts and not on others, but whatever is the ultimate decision we will accept it.
>
> "I am going to ask you to go back and try again, and if you can't agree, that is it, we have to quit.
>
> "So will you please go back and try again?"

After the jury had left the courtroom the trial judge stated that he gave defendant "an exception to the Allen charge." (A 48a).

With respect to the supplemental charge just adverted to, the Court of Appeals said in its affirming opinion (App. 6-7):

> "We have had grave doubt as to whether the charge thus given was not unduly coercive. We have concluded that the case is saved from reversal by the barest margin, the margin provided in these circumstances and in this context by the judge's disclaimer

of intention to 'coerce' and by his expression of willingness to accept 'the ultimate decision,' whatever it might be."*

**The Unenlightening Supplemental Charge After The Jury Had Requested Clearer Definition of Matters Covered In The Main Charge.** (Question 2, *supra*).

In his main charge, the trial judge separated the counts of the indictment into three groups, and handed to the jury a chart indicating into which of each of these groups the various counts of the indictment fitted (A 34a-35a, 36a-37a and 38a-39a), stated the elements which he claimed must be found in order to prove a case as to any of those groups (*ibid.*), and generally charged as to the meaning of the phrase "aid, abet, induce or procure" (A 39a).

After the jury had been out for approximately 2¾ hours, they sent a note to the court reading "Require, if possible, a clearer definition of charge in each group and three words, bribery, gratuity and aiding and abetting" (A 42a). The court stated to counsel "I guess I will have to recharge them" and the attorneys indicated that they did not see any alternative (A 42a).

Thereupon, the trial judge purported to recharge the jury; but he did not add a single word to what he had previously said, merely rereading to the jury what he had already stated in his main charge, practically word for word (A 42a-47a).

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* Defendant on his post-trial motion to set aside the verdict, produced affidavits of one of the jurors which demonstrated that the jury in fact was coerced into compromising by the charge of the trial judge. (A 60a-63a). The Court of Appeals refused to consider these affidavits (App. 7, footnote 3).

Although the proposition that this additional charge to the jury was insufficient and unenlightening was specifically raised by defendant as appellant in the Court of Appeals, that court made no mention of the subject in its affirming opinion.

**The Withholding of Data Covered by 18 U. S. C. §3500 and the Refusal to Follow the Procedure as to Discovery Therein Provided.** (Questions 3 and 4, *supra*).

At the completion of the direct examination of the witness Clyne (one of the crooked Internal Revenue Service agents), and before cross-examination of this witness had commenced, the question was raised by the trial judge as to whether there was "3500 material" (R 147, 148). From a statement made by the Assistant United States Attorney, it appeared that there was an electronic recording of "a portion of a conversation between Clyne and William Cody [a Government undercover agent], relating to Eugene Kenner, September 26, 1963, here in New York City." (R 149-150). There arose some confusion about the manner of transcribing this tape recording, part of which was inaudible; but the Assistant United States Attorney conceded that the tape "has to be turned over." (R 151-152). There was obvious further confusion as to whether, under the provisions of 18 U.S.C. §3500, the court should listen to the recording or should merely look at a transcript of a portion of the recording furnished by the Government (R 153-156). Earlier, the Assistant United States Attorney had stated that there were portions of the tape recording involving discussions about "other things, completely extraneous, social and a lot of other things referring to matters that the government would prefer not to turn over." (R 153). The Assistant United States Attorney then suggested that he would permit defense

counsel and a Government agent to sit down and listen to the tape, but modified this statement by saying "I hope they can listen to a substantial portion of it. . . . So that I will, in effect, be giving defense counsel, I hope, a large portion of this tape." (R 154). It later transpired that part of the tape recording was unintelligible and that defendant's counsel had insufficient time to listen to the recording (R 182-183) and that, as to the portion already listened to, matters were discovered "that the defense feels genuinely valuable for cross-examination. How much more might be in the recording is only a matter of guess." (R 183). Defendant claimed that the failure to turn over the recording until March 15, 1965, although it had been in the possession of the Government since September 26, 1963, and the short time granted to defendant's counsel to hear the recording was unreasonable and defendant moved for a mistrial, which motion was denied and an exception granted (R 182-184).

Up to this stage of the trial, the question of the recording presumably concerned only a single conversation between Coady* and Clyne, because that was all that had been mentioned until then. However, when Coady was being cross-examined, it developed that, as an undercover agent for the Internal Revenue Service, he had occupied a room at the Hotel Webster in New York (R 270) for a period of two months, during which he entertained numerous Internal Revenue Service agents (R 271, 272-273), and that, during this entire period (R 273), the room at the Hotel Webster was electronically wired to record conversations between Coady and the agents (R 272-273). During this period of two months, Coady entertained Clyne twice, not once as had been previously indicated (R 271). Thus, the question arose whether defendant should not be

* The correct spelling of this surname is "Coady." In some quotations, hereinabove, it has been otherwise spelled, because that other spelling is what appears in the transcript.

given, as §3500 material, the transcript of all the electronic recordings. This matter came to light for the first time on March 17, 1965, the last day when testimony was taken (*cf.*, R 177), and both sides rested on that day (R 302).

At the opening of court on the very next morning (R 307), before either side's summation to the jury and before the charge, the following occurred (G 57a-58a):

> "Mr. Keeffe [defense counsel]: We have an application that presents a problem. This came up in the transcript yesterday and frankly slipped right by us at the time until we read it last night. But it is apparent from Mr. Coady's testimony on Page 273 of the record and Page 271 that there is more than one conversation with Mr. Clyne in an apartment, and only one tape was shown to us. That is the testimony at the moment, and we are concerned about the problem of 3500 on this.
>
> "The Court: You are protected, counsel. If the government didn't turn it over to you you are home free.
>
> "Mr. Keeffe: How do we find that out?
>
> "The Court: In the Court of Appeals, I suppose.
>
> "Mr. Humphreys [Assistant United States Attorney]: I will state on the record there is no other tape of a conversation of Mr. Coady and Mr. Clyne.
>
> "Mr. Keeffe: That is not sufficient.
>
> "The Court: I don't care whether it is sufficient or not. You have no other choice.
>
> "Mr. Keeffe: The procedure is set out—
>
> "The Court: Please, counsel.
>
> "Mr. Keeffe: Might I just cite the case of Campbell against the United States.
>
> "The Court: Yes, I read it until I am sick."

In his post-trial motion to set aside the verdict, which was denied, defendant again specifically raised the point

that he had been deprived of his rights under 18 U. S. C. §3500 (A 53a-54a).

The Court of Appeals sustained the Government's contention in this respect upon the ground that there was no abuse of discretion (App. 7).

**The Bar of the Statute of Limitations.** (Question 5, *supra*).

The indictment was filed on December 7, 1964 (A 1a). Count 23 thereof alleges the commission of a crime on August 11, 1961 and count 24 thereof alleges the commission of a crime on November 28, 1961 (A 9a), both more than three years prior to the filing of the indictment.

The only testimony as to the date of the commission of these two crimes is to the effect that the same were committed on the dates stated in the indictment (A 21a-23a; A 22a-24a).

As we have heretofore seen, the defendant moved "to correct an illegal sentence" because prosecution of the charges contained in these counts was barred by the running of the statute of limitations, the District Court denied the motion on the ground that, since an appeal had been taken, that court could not rule on the motion, and the Court of Appeals, in effect, denied the motion stating that the defense of the statute of limitations was not available since it had not been raised before or during the trial.

**Other Matters of Law Raised in the Record.** (Questions 6, 7 and 8, *supra*).

The subjects referred to in questions 6, 7 and 8, *supra*, are matters of law involving constitutional principles and the interpretation of statutes. Each of them was specifically raised below. No special factual material is essential to the consideration of these questions.

## ARGUMENT

### (Reasons for Granting the Writ)

In presenting our Argument, we follow the methodology utilized above in our Statement of the Case—that is, we present our individual reasons for granting the writ in the order employed when we set forth the questions herein presented. In each instance, we state the legal argument first and then the precise reason (Rule 19 of this Court) why certiorari should be granted as to a particular question.

### I.

### The coercive charge after the jury had announced itself hopelessly deadlocked is reversible error.

At pages 8-9, *supra,* we have set forth the text of the supplemental charge of Judge MURPHY after the jury had sent him a note reading "Jury hopelessly deadlocked. No change in sight." As we have noted, this charge was given at the request of the Government for "an Allen charge" and over the objection of the defendant (A 47a). The defendant took an appropriate exception (A 48a).

#### A.

This Court in its opinion in *Allen* v. *United States,* 164 U. S. 492, 501, summarized and gave the history of the "Allen charge" as follows:

> "These instructions were quite lengthy, and were, in substance, that in a large proportion of cases absolute certainty could not be expected; that although the

verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. These instructions were taken literally from a charge in a criminal case which was approved of by the supreme court of Massachusetts in *Com.* v. *Tuey,* 8 Cush. 1, and by the supreme court of Connecticut in *State* v. *Smith,* 49 Conn. 376, 386."

But Judge MURPHY, in the instant case, did not give the Allen charge, either in its original text, as approved by the highest courts of Massachusetts and Connecticut and by this Court, or as summarized by this Court. Instead, he read to the jury a paragraph of this Court's opinion in *Allen*, which *followed* this Court's summary of a correct charge. As was pertinently stated by the Circuit Court of Appeals for the Eighth Circuit, reversing a judgment of conviction because the trial court had read to the jury the *same* paragraph from the *Allen* case opinion as was read by Judge MURPHY in the instant case (*Stewart* v. *United States,* 300 Fed. 769, 786 [1924] followed with express approval in *Nigro* v. *United States,* 4 F. 2d 781, 783-784, 785 [8th Cir., 1925]):

"This paragraph of the opinion in Allen's Case, as

we have said, was no part of the charge of the court in that case, but it was a part of the argument of the Supreme Court in support of the standard and approved charge in that case, and it was intended to show the absurdity of a stubborn refusal by a juror to listen to the arguments of his fellows, or to consider anything but the conclusion he had reached before the jury retired to deliberate. There was no evidence in this case that any juror had not listened with deference to the arguments of the majority, or that any juror went to the jury room with a blind determination that the verdict should represent his opinion of the case at the time he entered that room, or that any juror had closed his ears to the arguments of men who were equally honest and intelligent with himself. The legal presumption was and is that each juror had listened deferentially to and considered the arguments of those who differed with him, and thereafter had conscientiously formed and expressed his honest conviction and judgment upon the issues submitted to them, and, while the excerpt from the opinion in Allen's Case was a proper and persuasive argument for the standard and approved charge under such circumstances, it so slightingly treated the positive duty of each juror to form and to make his verdict express his own honest conviction, based on the evidence in the case, and so forcibly urged deference to the views of the majority and unanimity, that we are unable to resist the conviction that it tended too strongly toward coercion of the minority of the jury to surrender their honest convictions in order to acquiesce in the convictions of the majority."

That the burden of the decisions in *Stewart* and *Nigro* was directly concerned with the reading of the wrong portion of this Court's opinion in *Allen* is highlighted by the fact that, where the correct portion of *Allen* was read to the jury in another case, the Eighth Circuit

approved such reading (*Boehm* v. *United States*, 123 F. 2d 791, 812 [8th Cir., 1941], cert. den. 315 U. S. 800, rehearing den. 315 U. S. 828 [1942]).

Nor is the Eighth Circuit the only one which disapproves of the reading of the portion of the *Allen* opinion read by Judge MURPHY in the instant case. As recently as June 25, 1964, the Court of Appeals for the District of Columbia Circuit (*Williams* v. *United States*, 338 F. 2d 530, 531-532, 533) reversed a conviction upon the ground, among others, that the trial court had read this very paragraph in substance to the jury.

Up to this point, we have considered only the error committed by the trial judge in reading the wrong excerpt from the opinion of this Court in *Allen*. We shall presently demonstrate that, even if Judge MURPHY had given a correct "Allen charge", his additions thereto would, in and of themselves, amount to such gross coercion that reversal would be required.

However, before proceeding to that portion of our argument, we deem it proper to invite the attention of the Court to the fact that, even in his reading of the wrong portion of the opinion of this Court in *Allen*, Judge MURPHY misquoted that very portion, and that this misquotation, in the context wherein it was delivered, amounted to coercion.

In the "reasoning" portion of its opinion in *Allen* (*not* the Allen charge summary), this Court said:

> "The very object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors themselves." (164 U.S. at p. 501).

When Judge MURPHY purported to read this sentence to the jury, he changed the text in such manner as to personalize the sentence and make it appear that this Court was

giving specific instructions to a jury—indeed, *this* jury. Judge MURPHY read the sentence as follows:

> "The very object of the jury system is to secure *your* unanimity by a comparison of views and by arguments amongst the jurors themselves." (A 48a, emphasis supplied).

In the last above quotation we have emphasized the word "your", because this is the significant departure interpolated by Judge MURPHY into the quoted portion of the opinion of this Court. It could not help but convey to the jury the fact that it was obliged to follow an admonition addressed to it and to other juries similarly situated by the Supreme Court of the United States. Indeed, Judge MURPHY removed any doubt as to the jury so believing by saying, a few seconds later, "certainly the advice of the Supreme Court should be heeded." (A 48a).

There is not now and never was a requirement that juries must agree. A reading of the opinion of this Court in *Allen* rebuts any notion of such a requirement. "Indeed, a mistrial is as much a part of the jury system as a unanimous verdict." (*Williams* v. *United States,* 338 F. 2d 530, 533 [D.C. Cir., 1964]).

**B.**

Even if Judge MURPHY had read to the jury a correct Allen charge, the matters which he added to it, in and of themselves, constitute reversible error. As background for this proposition, we first note the position of the Allen charge in our jurisprudence:

There is no question that the Allen charge, itself, approaches the ultimate or outermost permissible limits of a trial court's instructions to a deadlocked jury. (*Green* v. *United States,* 309 F. 2d 852, 854 [5th Cir., 1962]; *Powell* v. *United States,* 297 F. 2d 318, 321 [5th Cir., 1961], citing and quoting with approval *United States* v. *Rogers,* 289

F. 2d 433, 435 [4th Cir., 1961], which, in turn, was approved by this Court in *Jenkins* v. *United States,* 380 U.S. 445, 446 [1965]). The Allen charge has created unrest and dissatisfaction in many jurisdictions, both State and Federal (*cf., Green* v. *United States,* 309 F. 2d 852, 854-855, footnotes 1 through 3, inclusive [5th Cir., 1962]). It has been derisively referred to in carefully reasoned opinions as the "dynamite charge," "third degree instruction" and "shotgun instruction" (*ibid.*). One thing is perfectly clear from *all* of the decisions passing on the point. That is, that if anything is added to a proper Allen charge, which in any manner fails to remind the jurymen of their *individual* duty not to concur in a verdict unless *each* juror has independently reached the conclusion that the guilt of the defendant has been established beyond a reasonable doubt, such addition to a proper Allen charge constitutes reversible error. (Note the following decisions and the numerous cases cited and quoted from therein: *United States* v. *Rogers,* 289 F. 2d 433, 435 [4th Cir., 1961]; *Green* v. *United States,* 309 F. 2d 852, 855-856 [5th Cir., 1962]; *Williams* v. *United States,* 338 F. 2d 530, 533 [D.C. Cir., 1964]).

Let us now examine the supplemental charge delivered by Judge MURPHY to the jury, after the jury had sent him a note stating that it was "hopelessly deadlocked."

He started by sarcastically reminding the jury that the length of time they had been deliberating "is not one of the world's records for jury deliberation." (A 47a).

He then proceeded by saying: "But these things happen and I am going to tell you what the United States Supreme Court said, about one hundred years ago, in a somewhat similar situation." (A 47a-48a). Forthwith, he read to the jury the *wrong* paragraph from this Court's *Allen* opinion, to which we have referred, above.

He then said "[y]ou know, what we all try to achieve is unanimity in these cases. I hope that you can do it." (A 48a). As we have heretofore shown, neither this Court nor any other court has ever stated that it is a function of a jury trial to seek unanimity, *as such.* The cases tell us that although the object of the jury system is to seek unanimity, this unanimity is only proper when it results from a comparison of views and from arguments among the jurors, themselves, with the final result that *each* juror, *as an individual,* has personally held or been persuaded to the view that the verdict, as announced, represents his *individual* determination.*

Judge MURPHY then told the jury:

> "I don't mean by reading this charge to coerce some juror who feels that he or she is of this opinion or that *but certainly the advice of the Supreme Court should be heeded.*" (A 48a, emphasis supplied).

The Court of Appeals, in the instant case, stated (App. 6-7):

> "We have had grave doubt as to whether the charge thus given was not unduly coercive. We have concluded that the case is saved from reversal by the barest margin, the margin provided in these circumstances and in this context by the judge's disclaimer of intention to 'coerce' and by his expression of willingness to accept 'the ultimate decision,' whatever it might be."

But the Court of Appeals apparently disregarded the fact that Judge MURPHY's statement of his intention not to "coerce" the jurors was not a separate portion of the

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* The imperfect charge by Judge MURPHY that "what we all try to achieve is unanimity in these cases" became all the more damaging in the light of his misquotation of the opinion of this Court in the *Allen* case, to which we have referred, above.

supplemental charge, but was part of the *same* sentence as impressed on the jury that "certainly the advice of the Supreme Court should be heeded." Judge MURPHY was, in effect, telling the jury that this Court advised unanimity in a situation such as that presented by the case at bar. Neither this Court nor any other has so advised. In every decision covering the subject, there has been a requirement that the verdict must represent the conscientious determination of *each* juror *as an individual.**

The opinion of the Court of Appeals, herein, stated that one of the things that led to its conclusion that "the case is saved from reversal by the barest margin" was that Judge MURPHY expressed his willingness to accept the "ultimate decision," whatever it might be. Here, again, the Court of Appeals apparently overlooked the fact that this statement was not independently set forth in Judge MURPHY'S charge. *It was part of a coercive sentence.* The sentence as a whole was: "It may be that you can agree on some of the counts and not on others, but whatever is the ultimate decision we will accept it." (A 48a). Actually, and as the event proved, this was one of the most damning deficiencies in the supplemental charge. Judge MURPHY was indicating to the jury that they certainly ought to be able to agree on *some* of the counts. It was an invitation to compromise. As the verdict shows, there was, indeed, a compromise; because, as we have heretofore demonstrated, the jury brought in a completely inconsistent verdict, finding the defendant guilty of some of the acts expressed in certain counts of the indictment and finding him not guilty of the *same* acts expressed in other counts of the indictment.

* * * *

* In addition to the cases cited by us, *supra*, the attention of this Court is respectfully invited to the cases cited and quoted from in the opinion of the Court of Appeals *in the instant case* (App. 4-6).

The Court of Appeals, after expressing "grave doubt" as to whether the supplemental charge "was not unduly coercive", has indicated its conclusion "that the case is saved from reversal by the barest margin". We submit that this conclusion impermissibly presupposes an illegal, illusory, unfair and unjust standard. It has never been suggested, until the decision of the Court of Appeals in the instant case, that determination whether a defendant has had a fair trial is made by the application of a legalistic micrometer. The "barest margin" of assurance is not enough.

The law requires that the guilt of a defendant be established beyond a reasonable doubt. An obvious corollary of that requirement *must* be that the principles of law upon which a conviction is based should be clear. The requisite clarity of law cannot be said to exist in a situation, like that of the case now at bar, where an appellate court tacks together isolated phrases from a charge to justify a holding that such phrases by the "barest margin" prevent the charge from being coercive.

A jury made up of laymen is hardly capable of the type of logic (or illogic) which spells out a non-coercive meaning by taking a pious disclaimer of an intent to coerce and separating that disclaimer from a clearly coercive charge. As this Court has explicitly recognized, the influence of the trial judge on the jury is necessarily and properly of great weight and, particularly in a criminal trial, the judge's last word is apt to be the decisive word. (*Bollenbach* v. *United States,* 326 U. S. 607, 612 [1946], quoting from and citing with approval *Starr* v. *United States,* 153 U. S. 614, 626 [1894]).

Certiorari should be granted as to Question # 1 (page 2, *supra*) upon the grounds that the Court of Appeals: (a) has decided a Federal question (to wit, the coercive-

ness of the supplemental charge) in a way in conflict with the applicable decisions of this Court; (b) has rendered a decision in conflict with the decisions of several other Courts of Appeals on the same matter; and (c) has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings (in approving isolated phrases as saving a coercive charge from condemnation by the "barest margin") as to call for an exercise of this Court's power of supervision.

In connection with its power of supervision, we respectfully suggest that this Court may desire to grant certiorari in the instant case in order, once and for all time, to clear up the numerous misapprehensions with respect to the Allen charge, and to decide which of the conflicting constructions of that charge by the various Courts of Appeals is or are correct, and/or to reconsider its decision in *Allen* in the light of repeated and constant expressions of dissatisfaction therewith by both Federal and State courts.

## II.

**The unenlightening supplemental charge, after the jury had requested clearer definition of matters covered in the main charge, is reversible error.**

At pages 10-11, *supra,* we have set out the facts underlying our present contention. In summary, they are as follows: In his main charge, Judge MURPHY separated the counts of the indictment into three groups, giving the jury a chart indicating into which of each of these groups the various counts of the indictment fitted, stated the elements which he claimed must be found in order to prove a case as to each group, and generally charged as to the meaning of the phrase "aid, abet, induce or procure."

Apparently, the jury was confused by the instructions contained in the main charge; because, after deliberating for approximately 2¾ hours, they addressed a note to Judge MURPHY, which read: "Require, if possible, a clearer definition of charge in each group and three words, bribery, gratuity, aiding and abetting." Judge MURPHY told counsel that he guessed he would have to recharge the jury and counsel agreed that they saw no other alternative.

In his so-called recharge, Judge MURPHY added not a single word to what he had stated in his main charge, actually rereading the main charge practically *verbatim.*

In other words, the jury having indicated to Judge MURPHY that the main charge was not clear enough and that they required a "clearer" definition, he did *nothing* to give them a "clearer" understanding, *but merely repeated that which they had already told him was unclear.*

In his consultation with counsel before recharging the jury, Judge MURPHY had said: "If they [the jury] have some question about that I will ask them to tell me what part they don't understand." (A 42a).* However, he made no such inquiry of the jury. Instead, at the beginning of his recharge, after reading the note from the jury into the record, he said (A 42a):

> "I think what I will do is to repeat what I told you before and if that isn't clear, or any part is not clear, then I will ask you to write me a note, pointing out particularly what part you think is not clear enough." (A 42a).

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* This followed a statement by the Assistant United States Attorney indicating that he was in doubt about what the jury's communication meant. He said "I suppose that is what they mean." (A 42a).

After repeating his main charge, *word for word,* Judge MURPHY concluded his supplemental charge as follows (A 47a):

> "I think that is all I said in explaining those three groups of charges. As I said in the beginning, if you feel that something has to be explained further, please do not hesitate to give me a note."

What Judge MURPHY could possibly have meant by this invitation is incomprehensible. The jury had *already* sent him a note telling him what they required. They were asking for "clearer" definitions of the charge in each group and for "clearer" definitions of the words, bribery, gratuity and aiding and abetting. Not only did Judge MURPHY in his recharge *merely repeat what was already unclear* but he completely failed to give *any* definition of the "three words," bribery, gratuity and aiding and abetting, although the jury had specifically asked for "clearer definition" of these words.

As was decided in a leading case (*Powell* v. *United States,* 347 F. 2d 156, 158 [9th Cir., 1965]), it was the duty of the trial judge, if he had any doubt on the subject, to ascertain precisely what doubt existed in the minds of the jury requiring clarification and, if the jury's inquiry showed the initial charge left the jury confused,

> "[a]rereading of a portion of that charge which was not clearly responsive to the jury's inquiry could scarcely have clarified the matter in the jurors' minds. Clear error occurred, requiring reversal."*

The basic rule as to the duty of a trial judge has been stated by this Court as follows (*Bollenbach* v. *United*

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* In footnote 5 of its opinion, interpolated at this spot thereof, the Court of Appeals, Ninth Circuit, pointed out, with the citation of many cases, that it could notice the plain error in this instruction, despite appellant's failure to comply with Rule 30.

*States,* 326 U. S. 607, 612-613 [1946], quoted in *Powell* v. *United States, supra,* at pp. 157-158):

> "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relative legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."

It is clearly apparent that the trial judge in the instant cause did not meet his responsibility. First, he should have ascertained precisely what the jury meant by its note asking for "clearer" instructions. This he made no attempt to do. Second, he should have concretely and explicitly cleared up the jurors' doubts, a function he obviously failed to perform by merely rereading that which had already confused the jury.

* * * *

Certiorari should be granted as to Question #2 (page 2, *supra*) upon the grounds that the Court of Appeals has, by its affirmance, without even mentioning this contention: (a) deprived defendant of a fair trial and, therefore, of his constitutional right to due process of law (Amendment 5, U. S. Const.) by approving the conduct of the trial court in failing adequately to instruct the jury; (b) has rendered a decision in direct conflict with the position taken by the Court of Appeals for the Ninth Circuit (*Powell* v. *United States, supra*) on the same matter; and (c) has decided a federal question in a way in conflict with applicable decisions of this Court (*e. g. Bollenbach* v. *United States, supra*).

## III.

**The refusal of the trial court to afford defendant the protections provided in 18 U. S. C. §3500 is reversible error.**

At pages 11-14, *supra,* we have set out the facts underlying our present contention. In summary, they are as follows:

Clyne, one of the crooked Internal Revenue Service agents who testified against defendant, was entertained at a hotel by Coady, another Internal Revenue Service agent who was acting as an undercover agent for the Government and who also testified against defendant. The room in which Coady entertained Clyne was wired and electronic recordings were made of conversations in that room. The recordings were made over a two month period, during which Coady entertained numerous other Internal Revenue Service agents.

During the early part of the trial, it was indicated that Coady had entertained Clyne on but a single occasion, during which they had discussed the defendant. On the last day when testimony was taken, however, it developed that there was more than one conversation between Clyne and Coady in the hotel apartment. Only one tape recording had been furnished to defendant, although his lawyer had demanded all the recordings. It further developed that the second conversation with Clyne was not in the one tape permitted to be examined by defendant's counsel.

On the last day of the trial, after both sides had rested but before either side had summed up and before the court had in any manner charged the jury (this was the day following Coady's testimony), defendant's counsel

raised the question about his right to hear additional tapes in which the further conversations between Coady and Clyne were recorded. Judge MURPHY told counsel that he was sufficiently protected and that "If the government didn't turn it [the tape] over to you you are home free." Defendant's counsel then inquired how the defendant could find out whether there was a further tape recording. Judge MURPHY replied: "In the Court of Appeals, I suppose." The Assistant United States Attorney thereupon said "I will state on the record there is no other tape of a conversation of Mr. Coady and Mr. Clyne." Defendant's counsel said: "That is not sufficient." Judge MURPHY enigmatically replied: "I don't care whether it is sufficient or not. You have no other choice." Defendant's counsel then asked the court to consider the procedure in the case of *Campbell* v. *United States.* Judge MURPHY replied: "Yes, I read it until I am sick."

The decision of this Court in *Campbell* v. *United States,* 365 U. S. 85, 96 (1961), clearly demonstrates that, in the circumstances of this case, it was incumbent upon the trial judge to call Coady back to the stand "of his own motion or require the Government to produce him. Not only did the Government have the advantage over the defense of knowing the contents of the [remaining tapes] but it also had the advantage of having [Coady] in its employ and presumably knew, or could readily ascertain from him, the facts about the [contents of the remaining tapes]."

The defendant was not required to take the Assistant United States Attorney's bare assurance that there was no other tape of a conversation between Coady and Clyne. (*Young* v. *United States,* 346 F. 2d 793, 794 [D. C. Cir., 1965]; *cf.,* also, *Killian* v. *United States,* 368 U. S. 231, 236-244 [1961]). The failure to afford him the protection of 18 U. S. C. §3500 under the circumstances here pre-

sented is *not* harmless error, but requires reversal (*Clancy* v. *United States,* 365 U. S. 312, 315-316 [1961]).

The Court of Appeals, in its affirming opinion *avoided the entire question of whether defendant's substantive rights had been violated.* It based its affirmance in respect to this matter solely upon the ground that: "Whether or not to permit the case to be reopened for further proceedings was within the discretion of the court. The facts here show no abuse of discretion." (App. 7).

It is our submission that the defendant had a *right* to the procedures provided in 18 U. S. C. §3500. The *existence* of this right is clearly set forth not only in the statute but also in the decisions cited by us, above. The precise *extent* of defendant's rights and *the procedure mandated upon the trial court* is spelled out with very clear specification in 18 U. S. C. §3500 [App. 15-17].

Coady and Clyne had testified as government witnesses. After such testimony, the trial court was under an *absolute mandate* on motion of the defendant to order the United States to produce the electronic transcription and if the entire contents of such transcription related to the subject matter of Coady's or Clyne's testimony, the trial court was required to order the transcription to be delivered directly to the defendant for his examination and use. (18 U. S. C. §3500(b); 18 U. S. C. §3500(c)(2)). At the very least, the defendant had the right to have the other tapes submitted to Judge MURPHY, so that he might excise such material as did not relate to the subject matter of Coady's or Clyne's testimony and, with such material excised, the court was under a duty to direct delivery of the tape for the use of the defendant (18 U. S. C. §3500(c)). Furthermore, when the tape with appropriate excision was delivered to the defendant, the court, in its discretion upon application of the defendant, could recess the proceedings for the period

reasonably required for the defendant to examine the tape. (*ibid.*).

* * * *

Judge MURPHY followed *none* of the procedures above set forth. Thereby, he violated the rights of the defendant. In affirming the conviction, the Court of Appeals ruled in such manner as to contravene decisions of this Court and of the Courts of Appeals in the Eighth and District of Columbia Circuits. (See cases cited above and below). For this reason alone, certiorari should be granted. But there is another and equally potent reason for granting certiorari which goes to the very essence of the fair trial concept:

In addition to failing to follow the procedures prescribed in 18 U. S. C. §3500, Judge MURPHY refused to allow Coady to be recalled. The Court of Appeals affirmed, in this aspect of the case, solely on the ground that it was within the discretion of the trial court whether the case should be reopened. Assuming, *arguendo,* that discretion was actually involved, it is our submission that there was an obvious abuse of discretion. A miniscule upset in the time-table of a trial does not constitute a ground for depriving a defendant of his statutory rights. The decision of the Court of Appeals, herein, is almost in direct conflict with that of the Court of Appeals, Eighth Circuit, in *Banks* v. *United States,* 348 F. 2d 231, 234-235 (1965), in which case the Government's contention was based upon much stronger considerations than exist in the case now at bar. The rationale of *Banks* is *a fortiori* applicable to the present cause.

By reason of the foregoing certiorari should be granted as to Questions #3 and #4 (pages 2-3, *supra*).

## IV.

**Prosecution under counts 23 and 24 of the indictment was barred by the statute of limitations. It was reversible error to hold that the fact that this contention was raised for the first time on a motion to correct an illegal sentence precluded its consideration.**

In affirming the conviction on the aspect of our present contention, the Court of Appeals spoke as follows (App. 10):

> "Appellant claims that the charges contained in two of the counts [23 and 24] on which he was convicted were barred by the running of the statute of limitations. Appellant first raised this defense after trial by a motion to correct an illegal sentence. The defense of the statute of limitations must be raised before or during the trial. 'If this is not done and a verdict of guilty is rendered, sentence may be lawfully imposed.'"

The Court of Appeals cited *Askins* v. *United States,* 251 F. 2d 909, 913 (D. C. Cir., 1958) as the source for its quotation. However, that decision, when analyzed, may be clearly differentiated from the case now at bar. In *Askins*, the defendant was indicted for first degree murder upon an indictment timely for that crime (since there is *no* time limitation) but not timely for the crime of second degree murder of which he was found guilty and sentenced, because the indictment was found more than three years after the offense. The Court of Appeals, District of Columbia Circuit, specifically held that the appellant *could* raise the question of the impropriety of his sentence

upon the ground that he could not be *punished* for committing second degree murder, since the indictment was found more than three years after that offense. The court went further and, instead of sending the case back for a new trial, ordered the defendant to be discharged. Significantly, the opinion stated: "Because of the long delay in the indictment, the applicable statute *simply precludes punishment* for the offense of which appellant was convicted." (251 F. 2d at p. 913, emphasis supplied). The quotation from *Askins* in the opinion of the Court of Appeals in the present case was, plainly, *dictum.**

The decision of the Court of Appeals in the instant case is precisely opposite to that of the United States Court of Appeals, Tenth Circuit, in *Waters* v. *United States*, 328 F. 2d 739 (1964). There, the opinion differentiated between the right to raise the defense of the statute of limitations in a criminal case from that in a civil case. The opinion discussed *Askins* and analyzed it substantially as we have analyzed it, above. The Court of Appeals, Tenth Circuit, citing many cases, said (328 F. 2d at p. 743):

> "Unlike the statute of limitations in civil cases, it is not a mere limitation upon the remedy, but a limitation upon the power of the sovereign to act against the accused. . . . Notwithstanding Roberts v. Hunter, supra, and the cases there cited, and the differentiation made in Askins, supra, if recognition of a distinction between the statute of repose in civil cases and the substantive bar in criminal cases, is to have any

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* *United States* v. *Taylor*, 207 F. 2d 437 (2d Cir., 1953) also cited by the Court of Appeals in its opinion in the instant case is completely inapplicable; because there the defendant had waived indictment and pleaded guilty on all counts of a multiple count information and, as the opinion stated, there was "nothing to indicate that the statute of limitations had run". The statement in *Taylor* about the right to raise the issue for the first time on motion was, again, simply *dictum*.

> meaning in the administration of criminal justice, the statute of limitations must be held to affect not only the remedy, but to operate as a jurisdictional limitation upon the power to prosecute and punish. . . . The language of the statute [the same statute as is involved in the case now at bar] clearly provides that no person shall be prosecuted, tried or punished for the offense charged here, unless the information is instituted within three years after the commission of the offense. It is plainly a limitation upon the power to prosecute or to punish. It is, therefore, jurisdictional, and noticeable at this stage of the proceedings."*

It should be noted that the instant case is not one where the claim of the bar of the statute of limitations rests solely upon the fact that the text of the indictment sets forth that the offense was committed more than three years before the indictment was found. If such were our contention, it might be argued by the Government that, through not raising the question before or at the trial, the defendant deprived the Government of the opportunity of proving that the offense, contrary to the allegation in the indictment, actually took place within three years before the indictment was found. In the case now at bar, the evidence clearly established, if anything, that the offenses charged under these two counts of the indictment actually took place more than three years before the indictment was found. What the evidence actually showed is an important factor in determining whether the prosecution was timely. (*McWhorter* v. *United States*, 299 Fed. 780, 781 [8th Cir., 1924]).

* * * *

Certiorari should be granted as to Question #5 (page 3, *supra*) because the Court of Appeals has rendered

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* It is noteworthy that this question was raised for the first time on appeal by a defendant appealing *in forma pauperis.*

a decision in conflict with the decisions of the Eighth, Tenth and District of Columbia Circuits on the same matter.

## V.

**The refusal to dismiss counts 23 through 27 of the indictment is reversible error and raises questions of such novelty and importance that this court should review the same.**

Counts 23 through 27 of the indictment (A 9a) accuse the defendant (under 18 U. S. C. §2) of having aided and abetted named crooked Internal Revenue Service agents in receiving fees for the performance of their duties in office audit examinations of income tax returns (in violation of 26 U. S. C. §7214(a)(2)). The evidence adduced, largely through the testimony of these crooked agents, was that defendant paid gratuities to these agents after they had, at his request, assigned the audit of certain income tax returns to themselves and then accepted defendant's suggestion as to amounts of expenses contained in those returns to be disallowed.*

When defendant first presented his motion to dismiss these counts, Judge MURPHY inquired of the Assistant United States Attorney whether his office "had any of these cases where you charged aiding and abetting" (R 293). The Assistant United States Attorney replied that another Assistant, who had drafted the indictment, informed him "that according to his research he found no cases which support an aiding and abetting theory under 7214." (*ibid.*).

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* As we have shown, defendant was acquitted of counts 2 through 6 of the indictment, which charged him with having bribed these *same* agents in the *same* transactions. (See pages 5-6 *supra*).

Judge MURPHY replied that he was disturbed by this situation and, hence, reserved decision (*ibid.*). He denied the motion at the end of the trial. (A 49a).

That the question now presented is a novel one cannot be denied. That it is of great importance arises from the fact, which will not be contradicted by the Government, that, at the present time, mass prosecutions are now being commenced for the first time, although the underlying statute is almost 100 years old, charging the crime of aiding and abetting under circumstances almost identical with the facts in the instant litigation. The failure of the Government to prosecute for all these years, "the want of assertion of power by those who presumably would be alert to exercise it," is significant in determining whether prosecution in this situation was and is legally possible. (*Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 352 [1941] citing *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 [1933]).

It is our submission that, in the circumstances of the present case, the defendant *could not as a matter of law* have been guilty of aiding and abetting the crooked Internal Revenue Service agents in the commission of a violation of 26 U. S. C. §7214(a)(2), for the simple reason that the crooked Internal Revenue Service agents, themselves, *did not as a matter of law* violate the said section.

The proof of our contention lies in the text of the controlling statutes, themselves:

26 U. S. C. §7214(a)(2) provides that any officer or employee of the United States acting in connection with any revenue law of the United States "who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty" is guilty of a crime. (App. 18). According to the section's

plain text, the crime is confined to situations where a fee, compensation or reward is prescribed by law and where a crooked employee demands and receives more than that statutory compensation. In his charge (A 39a) and supplemental charge (A 46a), Judge MURPHY specifically and correctly stated that "there is no law which requires the payment of a fee for the conducting of an audit by an Internal Revenue Service employee."

The purpose of the statute, quite obviously, is to protect members of the public, who by law are required to pay certain fees, from being mulcted by crooked Government employees and forced to pay more than the statutory fees. That this is the intent of the statute is emphasized by the penalty assessed against the crooked employee and the benefit which the same statute gives to the victimized member of the public. The crooked employee may be fined up to $10,000 or imprisoned not more than five years, or both. "The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured, to be collected by execution." (26 U. S. C. §7214(a); App. 19). It is absurd to believe that a person can be prosecuted for aiding and abetting the receipt by a crooked Government employee of excess fees and that the court is *required* to render a judgment in favor of the *same* person for the amount he paid the crooked employee.*

In its affirming opinion, herein (App. 9), the Court of Appeals took exception to what it said was a claim by appellant that section 7214(a)(2) is an historical vestige reenacted through apparent oversight. The Court of Appeals pointed out that the section was reenacted in 1954, so that the language in one sentence thereof was broadened

* The Court *must* enter such a judgment. There is no discretion, although the same statute permits the Court to award a sum for the use of an informer "in its discretion." (App. 18).

from "any officer or agent appointed or acting under the authority of any revenue law of the United States," to read "any officer or employee of the United States acting in connection with any revenue law of the United States." (App. 9). This observation of the Court of Appeals begs the question now presented. We have not urged and do not urge that the crooked employees, as such, were not within the section. It is our submission that the section is directed against crooked Internal Revenue Service employees, who exact from a victim a payment *in excess of a fee or compensation provided by law;* but that, in this case, *there was no fee or compensation fixed by law* and that, therefore, the venal Internal Revenue Service agents did not commit a crime which the defendant *could* have abetted.

In his brief to the Court of Appeals, Petitioner (there appellant) demonstrated that the predecessor of section 7214(a) was first enacted almost a hundred years ago (C. 186 §98, 15 Stat. 165 [1868]). Through successive renumberings, but in substantially the same text, the statute was continued until it became section 7214(a).* The statute was first entirely devoted to the taxation of distilled spirits and tobacco and established stamp taxes, some of which exist to the present date. (Commissioner of Internal Revenue, *History of the Internal Revenue Service, 1791-1929,* page 6 [1930]). When the Internal Revenue Service was established in 1862, its entire staff consisted of less than four thousand persons, who not only received salaries but were entitled by law to the payment of statutory fees and commissions (*ibid,* pages 3, 5). The tax inspector, the gauger and others were paid fees directly by the taxpayer (Rev. Stat. §§ 3151 and 3157). The danger that Government employees might mulct taxpayers

* The successive renumberings and reenactments of the 1868 statute are found in Rev. Stat. §3961 and §4047(e) of the Internal Revenue Code of 1939.

by insisting upon the payment of more than the statutory fees and compensation led to the enactment of the earlier forms of section 7214(a).

Section 7214(a) was never intended to cover any type of case except a situation where a fee or compensation is fixed by law and a greedy Government employee insists on a payment in excess of the amount so fixed.

A case directly in point is *United States* v. *Gerdel,* 103 F. Supp. 635, 636-638 (U. S. Dist. Court, E. D. Missouri, E. D. [1952]). There, the defendant was an Internal Revenue Service employee. He made an appointment with a taxpayer and went to the taxpayer's home in the evening after working hours. The taxpayer was getting up his 1948 Federal and State income tax returns. They were partially completed by the taxpayer, who signed the same and gave the defendant authority to complete the returns and file them in the office of the Collector. The defendant thereafter completed the returns at his own home and filed the same. When the taxpayer had given the defendant the necessary preliminary records, data and other information for the completion and filing of the returns, the taxpayer inquired of the defendant how much he owed him for his work in preparing the returns and, by agreement, paid the defendant twenty-five dollars. The indictment charged that it was the practice of the Treasury Department, followed in the office of the Collector, that agents and employees during working hours furnished taxpayers assistance in the preparation and filing of their income tax returns, "same being a part of the official duties of such agents and employees, for which no charge or compensation is made to the taxpayers." The indictment further charged that during the years of service of the defendant as an Internal Revenue Service agent "defendant had his attention called officially to the regulations of the Department of Internal Revenue, prohibiting em-

ployees and agents of the Treasury Department from accepting any compensation for services rendered in connection with their official duties." The defendant was prosecuted under subsection (e) of section 4047, which is now section 7214(a). The United States District Court acquitted the defendant, stating in its opinion (103 F. Supp. at pp. 637-638):

> "Reading sub-section (e) of Section 4047 [now §7214(a)] as a whole leads us to believe the Act was not intended to cover the character of conduct engaged in by the defendant. Sub-section (e) provides a scheme or plan to cover and punish those who, while acting in their *official capacity* of making collections, under the innumerable laws and regulations providing for tax and fee payments to Internal Revenue employees, knowingly receive money not authorized. The law is aimed at 'extortion', 'fraud'—and those who knowingly charge more than authorized by law. This is indicated by the penalty provision—a very unusual one. The Court is authorized to render judgment against a defendant who violates the Act 'for the amount of damages sustained in favor of the party injured'. This penalty provision would have no application to a case of the character presented by the agreed statement of facts."

In its affirming opinion (App. 10) the Court of Appeals states that "[c]ontrary to appellant's contention, a payor of a bribe can be an aider and abettor under 18 U. S. C. §2", citing a number of decisions to that effect. This is a *complete* mis-analysis of the problem here presented. Defendant has been *acquitted* of being a briber (see pages 5-6, *supra*). He is charged with aiding and abetting an employee of the Internal Revenue Service in exacting a greater compensation *than is provided by law.* But there is no compensation provided by law! Our submission is

that a defendant *cannot as a matter of law* be guilty of aiding and abetting the commission of a crime, where the crime, itself, has not been committed.

* * * *

The Court of Appeals in deciding that a person can be guilty of aiding and abetting an Internal Revenue Service employee under the circumstances of this case decided an important question of federal law. No reported decision of *any* court seems to have passed on the matter, as was admitted by the Assistant United States Attorney who tried the case. This may well be because no one has ever been charged with or convicted of being an aider and abettor in the circumstances here presented, although the underlying statute is almost one hundred years old. With the great volume of indictments presently being sought in this novel situation, the matter becomes one of the gravest importance.

Therefore, certiorari should be granted as to Question #6 (page 3, *supra*) upon the ground that the Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court.

## VI.

**The trial court erred in charging as to certain counts of the indictment that there was no need for the Government to prove corrupt intent.**

Defendant was found guilty of counts 20 and 21 of the indictment (R 384), which charged that, in violation of 18 U. S. C. §201(f) [App. 14], he gave money to an Internal Revenue Service employee "for and because of official acts performed and to be performed" by the said

official "to wit, the office audit examinations of the income tax returns" of certain named taxpayers. (A 8a).

When charging the jury, Judge MURPHY gave them charts, in each of which charts certain of the counts of the indictment were grouped (A 34a, 36a, 38a). In one of the charts, Judge MURPHY included counts 20 and 21 (A 36a), referring to the counts set forth in this chart as "this second group of crimes charged" (A 37a). After setting forth the elements which the jury must find before it could return a verdict of guilty, he charged as follows (A 37a, emphasis supplied):

> "It must be readily obvious to you that there is in these elements for the second group *no need for the government to prove that the payment of money was with a corrupt intent to influence the employee, but rather only to prove that the defendant paid the money wilfully and knowingly, that is, intentionally, as distinguished from inadvertently or negligently;* and that such moneys were not required by law to be given, but were given for or because of the performance of the audit examination of the returns in question."

When the jury requested clarifying instructions including "if possible, a clearer definition of charge in each group" (A 42a) Judge MURPHY repeated the above-quoted portion of his main charge, *word for word* (A 45a).

The Court of Appeals, in sustaining this failure to charge necessity for proof of corrupt intent, differentiated between various sub-sections of 18 U. S. C. §201, pointing out that in some of these sub-sections but not in sub-section (f) the requirement for proof of corrupt intent was in the statute (App. 8-9). We submit that this "statute-text" argument is fallacious.

The crime charged in counts 20 and 21 is bribery. The Court of Appeals specifically recognized that fact in its affirming opinion (App. 3). Bribery is a common-law offense (11 *Corpus Juris Secundum* 841-842 and cases cited in footnote 15 on p. 842 of the main volume and in footnote 15 on p. 98 of the Cumulative Annual Pocket Part for 1965). Where, as in the case now at bar, there is a statutory definition of a common-law offense, even though a requirement for criminal intent is absent from the statutory enactment, a finding of criminal intent is requisite to conviction "in the light of an unbroken course of judicial decision in all constituent states of the Union holding intent inherent in this class of offense, even when not expressed in a statute." (*Morisette* v. *United States*, 342 U. S. 246, 261-262 [1952]). As was stated in *Walker* v. *United States*, 342 F. 2d 22, 25 (5th Cir., 1965), *Morisette* "distinguishes between crimes at common law and those not so considered, and stands for the proposition that if intent was a necessary element of a crime at common law, it is still a requisite of the offense, even if the crime has been codified into a statute where it is not mentioned."

The Court of Appeals in its affirming opinion herein (App. 9) stated that Petitioner (there appellant) "is not in any position to raise the point since in the trial court he failed to object to the charge on this ground." The Court of Appeals cited as authority for this proposition *United States* v. *Rinaldi*, 301 F. 2d 576, 578 (2d Cir., 1962). This Court has clearly otherwise ruled, specifically holding that where corrupt intent is a necessary ingredient of a crime, failure to so charge is reversible error, even when no exception was taken to the trial court's charge (*Screws* v. *United States*, 325 U. S. 91, 107-108 [1945]).

Thus far, in the present portion of our Argument, we have devoted ourselves to the problem presented by Ques-

tion 7 (pages 3-4, *supra*). This matter is inextricably entwined with the problem raised by Question 8 (page 4, *supra*). We have noted that Judge MURPHY erroneously failed to charge that conviction under 18 U. S. C. §201(f) requires proof of criminal intent; but this obvious error is at least partly chargeable to the vagueness of the section, itself.

18 U. S. C. §201(f) (App. 14) provides that a person is guilty of a felony who, otherwise than as provided by law, gives anything of value to a public official "for *or* because of any official act performed or to be performed by such public official" (*ibid.*, emphasis supplied). The word "or" is significant. It is a disjunctive preposition (*In re National Browne Co., Inc.*, 151 F. 2d 595, 596 [2d Cir., 1945]) and indicates that two separate crimes are defined by the statute (*United States* v. *Lee Foo Yung*, 46 F. Supp. 147, 149 [Dist. Court, E. D. New York, 1942]).

Analyzing the statute in the light of the disjunctive nature of the word "or" it becomes clear that the crimes charged therein are:

(a) The payment to a public official *for* an act *to be performed* by such public official; and

(b) Payment to a public official *because* an act *was* performed.

The former crime is bribery; because if one pays or offers payment to another "for" an act to be performed, there is necessarily involved an advance arrangement for the performance of that act and payment therefor. On the other hand, if an act has already been performed and payment is made because of such performance, there is no need for proof of an advance arrangement.

When Judge MURPHY charged that proof of criminal intent was not necessary, he could only have meant that the

payments charged in the instant case were *because* something had been done in the past without prior arrangement. In any other context, the statute is so vague as to be unconstitutional.

Strangely, although the Court of Appeals affirmed and denied that the statute was vague and branded Petitioner's (there appellant) argument as bordering on the frivolous (App. 8), the very paragraph in which this derisive characterization was made by the Court of Appeals shows that that Court, itself, *was completely confused as to the meaning of the statute and the nature of defendant's conviction thereunder.* The Court of Appeals said: "Far from being insufficient the evidence leaves no room for any other conclusion than that the payments were made *for* the pretended audits." (App. 8, emphasis supplied). The Court of Appeals apparently had the impression that defendant was convicted of having bribed the crooked Internal Revenue Service agents for performing "phony audits"* as a result of an advance arrangement (App. 8). The Court of Appeals either overlooked the fact that defendant was *acquitted* of these very offenses (R. 383) when the jury found him not guilty of counts 12 and 13 of the indictment (A 7a), or was so uncertain as to the meaning of 18 U. S. C. §201(f) as to *demonstrate*, by its confused conclusion, that the section *is* unconstitutionally vague.

A vast number of indictments have already been found in the Southern District of New York under 18 U. S. C. §201 (f). It is apparent that the Government intends to use this statute extensively. The section was fairly recently enacted (*Cf.* App. 15) and this Court has not yet been called upon to pass on its meaning or extent. The Court of Appeals in its affirming opinion (App. 8) has sustained the section against Petitioner's claim that it is

* Contrary to the inference in the affirming opinion (App. 8), there is *no* evidence that the deductions in the audits were "phony" or that the Government lost a penny in taxes!

"unconstitutionally vague", citing as the *only* authority in support of its holding another case in that court, which was decided on December 10, 1965, five days before the decision in the case now at bar. That case (*United States* v. *Irwin* [no official citation]) is, as we are informed by defense counsel therein, to be the subject of an application to this Court for a writ of certiorari.

* * * *

Certiorari should be granted as to Questions #7 and #8 (pages 3-4, *supra*), upon the grounds that the Court of Appeals: (a) rendered a decision in conflict with the decisions of other Courts of Appeal on the same matters; (b) has decided an important question of federal law which has not been, but should be, settled by this Court; and (c) has decided a federal question in a way in conflict with applicable decisions of this Court.

## CONCLUSION

**For the reasons set forth above, it is respectfully prayed that this petition for a writ of certiorari be granted.**

Respectfully submitted,

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HOWARD HILTON SPELLMAN,
ARTHUR LIONEL SCHATTEN,
*of counsel.*

## APPENDIX A

## Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 73—September Term, 1965.

(Argued October 4, 1965 Decided December 15, 1965.)

Docket No. 29760

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

EUGENE KENNER,

*Appellant.*

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Before:

WATERMAN, HAYS and ANDERSON,

*Circuit Judges.*

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Appeal from a judgment of conviction for violations of 18 U. S. C. §201(f) and for aiding and abetting (18 U. S. C. §2(a)) violations of 26 U. S. C. §7214(a)(2), entered in the United States District Court for the Southern District of New York upon a verdict of guilty after a trial before Thomas F. Murphy, *Judge,* and a jury.

Affirmed.

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HUGH C. HUMPHREYS, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York and Pierre N. Leval, Assistant United States Attorney, New York, N. Y., on the brief), *for Appellee.*

JAMES A. CUDDIHY, New York, N. Y. (John A. Keeffe, Herbert J. Korbel, and Havens, Wandless, Stitt & Tighe, New York, N. Y., of counsel), *for Appellant.*

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HAYS, *Circuit Judge*:

Kenner appeals from a judgment of conviction entered upon a jury verdict finding him guilty of violating 18 U. S. C. §201(f) (two counts) and of aiding and abetting (18 U. S. C. §2(a)) violations of 26 U. S. C. §7214(a)(2)[1]

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[1] These statutes provide in relevant part:

*18 U. S. C. §201(f):*

§201. Bribery of public officials and witnesses.

Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official.

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

*18 U. S. C. §2(a):*

§2. Principals.

(a) Whoever committs an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

*26 U. S. C. §7214(a):*

§7214. Offenses by officers and employees of the United States.

(a) Unlawful acts of revenue officers or agents.

Any officer or employee of the United States acting in connection with any revenue law of the United States—

* * * *

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty;

* * * *

shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more

(five counts). Kenner was sentenced to imprisonment of one year on each of the seven counts on which he was convicted, the sentences to run concurrently.

The offenses of which Kenner was convicted consisted essentially of bribery of employees of the Internal Revenue Service. Kenner was a certified public accountant who prepared income tax return for his clients and represented these clients when their returns were audited by the Service. His criminal activities, as pictured by the government's evidence, all followed a single pattern with only slight variations in individual cases.

Kenner would suggest to an auditor in the office audit division of the Internal Revenue Service in New York that he, the auditor, "pull" for audit X's tax return, X being one of Kenner's clients. This procedure was in itself irregular, since returns were ordinarily assigned to the individual auditors by the group supervisor. Kenner would then propose to the auditor an amount of deduction for business expenses, travel, entertainment, medical expenses or the like which should be disallowed. The auditor, without examining the merits of the proposed amount (or the substantiation for the amounts claimed) would make up his report disallowing the amount which Kenner had suggested. Kenner would then by prearrangement meet the auditor at some place outside the audit division's offices and, usually in a surreptitious manner, give him fifty or seventy-five dollars.

Appellant advances a number of claims of error in the proceedings of the district court. Finding that there was

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than $10,000, or imprisoned not more than 5 years, or both. The court may in its discretion award out of the fine so imposed an amount, not in excess of one-half thereof, for the use of the informer, if any, who shall be ascertained by the judgment of the court. The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured, to be collected by execution.

no error sufficiently prejudicial to call for reversal of the conviction, we affirm.

We shall examine appellant's contentions seriatim.

1. *The Allen charge.*

After deliberating for three hours and forty-five minutes the jury sent out a message stating that it was "hopelessly deadlocked." The judge thereupon, over defendant's objection, read to the jury a passage, slightly modified, from the opinion in *Allen* v. *United States,* 164 U.S. 492, 501-02 (1896).[2]

This court has in the past approved the *Allen* charge in certain circumstances. *United States* v. *Tolub,* 309 F. 2d 286 (2d Cir. 1962); *United States* v. *Curcio,* 279 F. 2d 681 (2d Cir.), cert. denied, 364 U. S. 824 (1960); *United States* v. *Kahaner,* 317 F. 2d 459, 484 n. 18 (2d Cir.), cert. denied, 375 U. S. 835 (1963). However, in all of these cases, as well as in *United States* v. *Thomas,* 282 F. 2d 191 (2d Cir. 1960), which is also cited by the government, the effect of reading to the jury that part of the *Allen* opinion which Judge Murphy read, was mitigated by the assurance in some form that a juror was not expected, in deference to the other jurors, to abandon his conscientious convictions.

In *United States* v. *Tolub,* which the government says quoted exactly that portion of the Supreme Court's opinion

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[2] "While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury-room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to arguments and with a distrust of his own view, his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and equally intelligent as himself."

quoted by Judge Murphy, the Judge added immediately after the quotation:

> "Remember at all times that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of evidence, but remember also that after full deliberation and consideration of all the evidence, it is your duty to agree upon the verdict, if you can do so, without violating your individual judgment and conscience."

In *United States* v. *Kahaner, supra* at 483-4, Judge Friendly said:

> "[The trial judge said in his charge] 'It is desirable if a verdict can be reached that this be done both from the viewpoint of the defendants and the Government', but that this was true only if the verdict 'reflects the conscientious judgment of each juror and under no circumstances must any juror yield his conscientious judgment.' . . .
>
> 'It has been a long trial and a trial, as I say, where I am satisfied each side prefers finality of judgment if it can be obtained on the basis of a conscientious reflection of each juror's final vote.' Exceptions of defense counsel were overruled and a motion for a mistrial denied; however, the judge recalled the jury and again emphasized, in a variety of ways, that 'if any individual juror still retains a conscientious view that differs from that of other jurors, * * * you are not to yield your judgment'; 'you are not to yield your judgment simply because you may be outnumbered or outweighed,' etc. . . .
>
> This recital of the facts suffices almost without more to dispose of the characterization, made by one of the appellants, that 'The jury was being coerced by being subjected, in these circumstances, on two separate occasions to the "dynamite" Allen charge.' On the con-

trary, if the charge is to be given at all, we do not see how this could be done with less tendency to coerion [*sic*] or more emphasis on the need for conscientious individual agreement than in the way Judge Weinfeld did it."

In *United States* v. *Curcio,* the trial court read to the jury that part of the *Allen* opinion which states "that it was their duty to decide the case if they could conscientiously do so."

In *United States* v. *Thomas,* the judge said in his charge:

"Your verdict, of course, must be the verdict of each individual juror and not a mere acquiescence in the conclusion of his fellows. . . ."

"It is your duty to decide the case, if you can do so conscientiously."

In the present case the only thing the judge added to the part of the *Allen* opinion which he read to the jury was the following:

"I am going to suggest that you think about that and go back and try again. You know, what we all try to achieve is unanimity in these cases. I hope that you can do it. I don't mean by reading this charge to coerce some juror who feels that he or she is of this opinion or that but certainly the advice of the Supreme Court should be heeded.

It may be that you can agree on some of the counts and not on others, but whatever is the ultimate decision we will accept it.

I am going to ask you to go back and try again, and if you can't agree, that is it, we have to quit.

So will you please go back and try again?"

We have had grave doubt as to whether the charge thus given was not unduly coercive. We have concluded that

the case is saved from reversal by the barest margin, the margin provided in these circumstances and in this context by the judge's disclaimer of intention to "coerce" and by his expression of willingness to accept "the ultimate decision," whatever it might be.[3]

2. *The Jencks Act material.*

When summations were about to begin on the morning of the day after both sides had rested, defense counsel asked permission to examine one of the government's witnesses to ascertain whether there was material in addition to that already provided, to which defendant would be entitled under the Jencks Act (18 U. S. C. §3500). The court denied the application. After verdict appellant renewed his application, and it was again denied.[4] Whether or not to permit the case to be reopened for further proceedings was within the discretion of the court. The facts here show no abuse of discretion. See *United States* v. *Sheba Bracelets,* 248 F. 2d 134 (2d Cir.), cert. denied, 355 U. S. 904 (1957).

3. *Concurrent sentences.*

The remaining contentions of defendant involve 18 U. S. C. §201(f), which is relevant to two of the counts, and 26 U. S. C. §7214(a)(2), which applies to the other five counts on which the appellant was convicted. Since the appellant was sentenced to one year's imprisonment on each of the seven counts, all sentences to run concurrently,

[3] We have not considered the affidavit of one of the jurors which was submitted by the defendant to support his allegation of coercion. *Stein* v. *New York,* 346 U. S. 156, 178 (1953), overruled in part by *Jackson* v. *Denno,* 378 U. S. 368, 391 (1964); *United States* v. *Crosby,* 294 F. 2d 928, 949-50 (2d Cir.), cert. denied, sub nom. *Mittleman* v. *United States,* 368 U. S. 984 (1962).

[4] The government and the witness whose testimony was sought filed affidavits denying that there was any additional material. In the absence of any evidence to the contrary it was not error for the court to refuse the requested *voir dire.*

this court must affirm if it finds that conviction was warranted on any one count. *Lawn* v. *United States,* 355 U. S. 339, 359, 362 (1958); *United States* v. *Houlihan,* 332 F. 2d 8, 13-14 (2d Cir.), cert. denied, 379 U. S. 828 (1964).

4. *18 U. S. C. §201(f).*

Appellant claims that Section 201(f) is "unconstitutionally vague." The section has recently been upheld by this Court against an attack on the ground of vagueness. *United States* v. *Irwin,* —— F. 2d —— (2d Cir. 1965). It is sufficient to say here that the statute is entirely clear as applied to the conduct with which appellant was charged, whatever its ambit with respect to other matters not involved in the present case.

"[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines,* 362 U.S. 17, 21 (1960).

Appellant's contention that the evidence failed to establish that the money given to the auditor by appellant was given "for or because of" an official act borders on the frivolous. After arranging for the phony audits, appellant told the auditor that he would contact him. When he did so he surreptitiously delivered an amount which would equal fifty dollars for each such audit. Far from being insufficient the evidence leaves no room for any other conclusion than that the payments were made for the pretended audits. See *United States* v. *Lev,* 258 F. 2d 9 (2d Cir.), aff'd by an equally divided Court, 360 U.S. 470, petition for rehearing denied, 361 U.S. 856 (1959).

Appellant contends that it was error for the judge to fail to charge that in order to convict under Section 201(f) corrupt intent to influence must be found. Examination of Section 201 shows that, although proof of corrupt intent is required for conviction under Subsections (b) (c) (d)

and (e), for violation of which the prescribed penalties are much more severe, conviction under Subsection (f) requires only proof that the payment was made "for or because of" the performance of an official act. In any event the appellant is not in any position to raise the point since in the trial court he failed to object to the charge on this ground. *United States* v. *Rinaldi*, 301 F. 2d 576, 578 (2d Cir. 1962).

5. *26 U.S.C. §7214(a)(2).*

Appellant was found guilty under 18 U.S.C. §2 by aiding and abetting certain other defendants in violating 26 U.S.C. §7214(a)(2). He argues that this was error because the acts which he was charged with aiding and abetting were not violations of §7214(a)(2).

Appellant's argument is based, first, upon the language of §7214(a)(2) which prohibits the receipt by an officer or employee of a "fee, compensation, or reward, except as by law prescribed, for the performance of any duty." The sums which appellant was charged with paying were not, he says, a fee, compensation or reward, but a "gratuity." We hold that the language of §7214(a)(2) is sufficiently broad to include the payments made by appellant.

Appellant's contention that §7214(a)(2) is "a historical vestige, reenacted through apparent oversight" is negatived by the fact that when Section 7214(a) was reenacted in 1954 its language "any officer or agent appointed or acting under the authority of any revenue law of the United States," was broadened to cover "any officer or employee of the United States acting in connection with any revenue law of the United States."

The presence in §7214(a)(2) of penalty provisions which would be inappropriate in their application to defendant (e.g. dismissal from office) does not preclude the applicability to that Section of the aiding and abetting statute. The legislative history of the 1951 amendment to 18 U.S.C. §2 shows that Congress intended that statute to apply to

situations in which the "principal" is, for example, an officer or employee of the United States and therefore subject to penalties, such as removal from office, which would be irrelevant to the situation of the person charged with aiding and abetting. See 1951 U.S. Cong. and Adm. Serv. 2583.

Contrary to appellant's contention, a payor of a bribe can be an aider and abettor under 18 U.S.C. §2. *May* v. *United States*, 175 F. 2d 994 (D. C. Cir.), cert. denied, 338 U. S. 830 (1949). See *United States* v. *Johnson*, 337 F. 2d 180, 196 (4th Cir. 1964), cert. granted, 379 U. S. 988 (1965); *United States* v. *Fromen*, 265 F. 2d 702, 705 (2d Cir.), cert. denied, 360 U.S. 909 (1959).

Appellant claims that the charges contained in two of the counts on which he was convicted were barred by the running of the statute of limitations. Appellant first raised this defense after trial by a motion to correct an illegal sentence. The defense of the statute of limitations must be raised before or during the trial. "If this is not done and a verdict of guilty is rendered, sentence may be lawfully imposed." *Askins* v. *United States*, 251 F. 2d 909, 913 (D. C. Cir. 1958). See also *United States* v. *Taylor*, 207 F. 2d 437 (2d Cir. 1953).

We find no error which requires reversal of the conviction.

Affirmed.

## APPENDIX B

## Constitutional Provisions, Statutes and Rules Involved

*Constitutional Provisions*

Amendment 5, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 8, United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

*Statutes*

Title 18, United States Code:

§2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§201. Bribery of public officials and witnesses

(a) For the purpose of this section:

"public official" means Member of Congress, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; and

"person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who

has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty; or

(d) Whoever, directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony or with intent to influence such person to absent himself therefrom; or

(e) Whoever, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity in return for being influenced in his testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom—

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; or

(h) Whoever, directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of his absence therefrom; or

(i) Whoever, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of the testimony under oath or affirmation given or to be given by him as a witness upon any such trial, hearing, or other proceeding, or for or because of his absence therefrom—

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(j) Subsections (d), (e), (h), and (i) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or, in the case of expert witnesses, involving a technical or professional opinion, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(k) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title. Added Pub. L. 87-849, § 1(a), Oct. 23, 1962, 76 Stat. 1119.

§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595.

Title 26, United States Code:

§6531. Periods of limitation on criminal prosecutions

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);

(4) for the offense of willfully failing to pay any tax, or make any return (other than a return required

under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;

(5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);

(6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States);

(7) for offenses described in section 7214(a) committed by officers and employees of the United States; and

(8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

§7214. Offenses by officers and employees of the United States

(a) Unlawful acts of revenue officers or agents.—

Any officer or employee of the United States acting in connection with any revenue law of the United States—

* * * *

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty;

* * * *

shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. The court may in its discretion award out of the fine so imposed an amount, not in excess of one-half thereof, for the use of the informer,

if any, who shall be ascertained by the judgment of the court. The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured, to be collected by execution.

*Federal Rules of Criminal Procedure*

Rule 29(a) Motion for Judgment of Acquittal.

Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

Rule 31(a) Return.

The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

Rule 52(b) Plain Error.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.